92-1755

Supreme Court, U.S.
FILED
APR 7 - 1993
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1993

DONALD R. LAMBORNE, *et al.*,

Petitioners,

V.

BRADLEY K. HAYNES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Donald R. Lamborne
210 Tomahawk Trail
Winchester, Virginia 22602
(703) 877-2130
pro se

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789

QUESTIONS PRESENTED FOR REVIEW

Did the Circuit Court of Frederick County, Virginia and the Supreme Court of Virginia err (re: record number 921009, No. L89-118 and L89-119) in denying the petitioners' rights to a trial on the merits of their filings, thus depriving them of their constitutional rights as guaranteed in the Fifth, Seventh, and Fourteenth Amendments and in Article III of the Constitution of the United States?

LIST OF ALL PARTIES

The names of all parties with addresses and telephone numbers of counsel of each party are:

FIRST VIRGINIA BANK - SHENANDOAH VALLEY
AND CHARLES R. CASH, PRESIDENT, Defendants
Counsel: Kathleen Barlow, Esq.
One First Virginia Plaza
6400 Arlington Blvd., #420
Falls Church, Virginia
(703) 241-4489

BRADLEY K. HAYNES
AND B.K. HAYNES CORPORATION, Defendants
Counsel: George W. Johnston, III, Esq.
P.O. Box 2740
Winchester, Virginia 22601

Kermit L. Racey, Esq.
P.O. Box 250
Woodstock, Virginia 22664

ESTATE OF NICHOLAS C. MILLER,
JOHN THORPE RICHARDS, Executor, Defendant
Counsel: William E. Schmidheiser, III, Esq.
100 South Mason Street
Harrisonburg, Virginia 22801

THE CIRCUIT COURT OF FREDERICK COUNTY
HONORABLE JAMES L. BERRY
Winchester, Virginia 22601

THE SUPREME COURT OF VIRGINIA
Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 5

APPENDIX A-1

AUTHORITIES

THE CONSTITUTION OF THE UNITED STATES:

- FIFTH AMENDMENT 3,4
- SEVENTH AMENDMENT 3,4
- FOURTEENTH AMENDMENT 3,4

BLACK'S LAW DICTIONARY, 6TH EDITION 4

Case No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1993

Donald R. Lamborne, *et al.*,

Petitioners,

v.

Bradley K. Haynes, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners, Donald R. Lamborne, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Virginia which refused to reverse the decision of the Circuit Court of Frederick County, Virginia.

OPINIONS BELOW

The Circuit Court of Frederick County, Virginia handed down a decision on October 10, 1990 whiched held that the Petitioners' action against the Defendants was barred by res judicata (App. A-1) The Supreme Court of Virginia denied a petition for appeal on November 4, 1992 (App. A-4) and petition for rehearing on January 8, 1993 (App. A-5)

JURISDICTION

Petitioner seeks review of the judgment of the Supreme Court of Virginia which denied Petitioner's request to set aside the judgment of the Circuit Court of Frederick County, Virginia and grant a rehearing thereof.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution Provides:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or pubic danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Seventh Amendment to the United States Constitution Provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the United States Constitution Provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of lfie, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners Donald R. Lamborne, *et al.*, respectively pray that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia which refused to review and reverse the decision of the Circuit Court of Frederick County, Virginia, which held that the Petitioners' action against these Defendants was barred by *res judicata*, since the Defendants alleged that the matter had been fully adjudicated in the bankruptcy court. In fact, there was never any trial on the merits of your Petitioners' contentions, and the Petitioners were seriously damaged by the fraudulent acts of the individual Defendants.

Your Petitioners had requested a jury trial of their allegations showing the harm that was done them by the acts of the Defendants which were never considered at any time in the proceedings in the bankruptcy court. The issues in the bankruptcy court involved only the sale of certain property and the fraudulent conduct of the Defendants was neither pled nor considered at any time in those proceedings.

Further, the parties were not the same, so that there was no opportunity for anything which might constitute *res judicata* or collateral estoppel. None of the parties to this litigation was before the bankruptcy court in its consideration of the sale of this property, which further establishes that there was no consideration of these issues nor could there be.

It is on this basis that your Petitioners allege that they have been denied their due process rights as guaranteed under the Fifth, Seventh and Fourteenth Amendments of the United States Constitution. The bankruptcy proceeding was appealed to the United States Court of Appeals for the Fourth Circuit, which simply dismissed the appeal on the grounds of mootness, since the sale had already been completed. The issues of the damage to your Petitioners was never addressed in any court.

As evidence of that, it would be noted that, in the proceedings in the bankruptcy court, neither Haynes nor Cash were ever either present or represented. It does not appear that there could possibly be due process in dismissing on the basis of *res judicata* and collateral estoppel an action where there was never any trial and where the defendant parties were not represented.

REASONS FOR GRANTING WRIT

The Petitioners filed two civil actions, number 890357 (as to Lamborne's) and 89-360 (as to Marjec, Inc.), in the Circuit Court of the City of Alexandria in July 1987. The Circuit Court proceeding was subsequently transferred to the Circuit Court of the County of Frederick. The two lawsuits alleged that the fraudulent acts and other torts committed by the five joint Defendants resulted in diminution of certain property rights held by the Petitioners.

The Defendants used as their principal defense collateral estoppel and *res judicata*, contending that the matters were tried in the Federal Court in the still pending bankruptcy proceedings.

This is not true, as evidenced in part by the following:

The original filing was transferred by the Petitioners to the Circuit Court of Frederick County; thus, it would be the "Trial Court". Black's 6th Edition, defines "trial court" as: "The court of original jurisdiction where all evidence is first received and considered; the first court to consider litigation."

It was in this court that a jury trial was requested, a right guaranteed by the Seventh Amendment to the Constitution. None was granted. "Trial" as defined by Black's is "A judicial examination and determination of issues between parties to action, whether they be issues of law or of fact, before a court that has jurisdiction." There has been no trial.

There was no examination of all facts or issues, no witnesses, the right for interrogatories was voided by the trial court, and the Petitioners did not even testify. The Petitioners have been denied their due process rights as guaranteed under the Fifth, Seventh and Fourteenth Amendments of the Constitution.

The Defendants claim the issues were tried in the Federal Court during the bankruptcy proceedings - - not in this suit. Now, what does the United States Court of Appeals (Fourth Circuit) say about this? In their unpublished opinion of November 12, 1987, No. 87-2532 (Defendants' Exhibit 3I), they write, "We grant the motion to dismiss for mootness" - - which has little or no relationship to the issues in the subject suit.

The Court further states:

> "Marjec did not object to the sale below, and did not question Haynes' good faith, so the court had no reason to address the issue. Marjec has not established

> that Haynes owed a fiduciary duty to Marjec. Nor has Marjec presented any evidence creating an inference of bad faith."

In essence, the Fourth Circuit says there was no litigation.

Very true, and of course not - - since there was no trial on the issues of this present suit - - no witnesses, no jury, none of the constitutional guarantees for the Petitioners.

To have been a trial (litigation) in the Federal Court, there would have had to have been litigants. Who were they? Haynes was not present in person or by counsel. Cash was not present in person or by counsel nor was the bank. So, how could there have been a trial, or litigation, if they were not there nor was any evidence proferred?

On the 22nd day of January, 1991, the leading defense attorney filed a brief in opposition to the petition for appeal (in this present case) to the Virginia Supreme Court, in which he stated, "On August 14, 1986, the Plaintiffs filed a Motion for Reconsideration making several wild, unsubstantiated allegations, and requesting - - "in referring to a reference in said Motion of some misgivings. How can it be "wild allegations" one moment, then a full blown trial the next? It must have been either one or the other. There was no trial in the Federal Court on the issues as involved in the subject suit and none has been permitted in the Circuit Court. The petitioner has further been denied his due process opportunity to present facts.

CONCLUSION

In view of the above facts, this Petitioner respectfully requests this honorable court to grant a writ of certiorari and reverse the decisions of the Virginia Supreme Court and the Circuit Court of Frederick County and remand the case for a trial on the merits.

Respectfully submitted,

/s/ Donald R. Lamborne
Donald R. Lamborne, *pro se*

VIRGINIA:

IN THE CIRCUIT COURT OF FREDERICK COUNTY

DONALD R. LAMBORNE, et al,	)	
Plaintiffs	)	
	)	AT LAW NO. 89-118
vs.	)	
	)	
FIRST VIRGINIA BANK-SHENANDOAH	)	
VALLEY et al,	)	
Defendants	)	
	)	
MARJEC, INC.,	)	
Plaintiff	)	
	)	AT LAW NO. 89-119
vs.	)	
	)	
FIRST VIRGINIA BANK-SHENANDOAH	)	
VALLEY et al,	)	
Defendants	)	

ORDER

This matter came on to be heard August 15, 1990 upon the praecipe of Bradley K. Haynes and B. K. Haynes Corporation. Upon due consideration of the issues between and among the parties and the briefs herein before filed, it is the opinion of this Court as set out in its letter opinion dated September 5, 1990 (a copy of which is attached hereto) that:

> Counts I, II, and III of Bill of Complaint designated a breaches of fiduciary duty as well as count VI all sound in fraud. Plaintiffs' brief having acknowledged knowledge of the alleged conspiracy on October 11, 1985, the one (1) year statue of limitations, ran out on October 12, 1986.
>
> Counts I, II, III and VI are therefore time barred as to all Defendants mentioned therein. It is the further opinion of the Court that Defendant exhibit 3 (I) collaterally estops Plaintiffs from re-litigating the

question of fraud as it is alleged against the Defendants Bradley K. Haynes and B. K. Haynes Corporation who are therefore dismissed as parties Defendant to these actions.

Plaintiff's conceded in argument that the causes of action set out in counts I, IV and VI are time barred as to First Virginia Bank - Shenandoah Valley.

By these rulings the Court has ruled against the defendants on their Sec. 8.01-271.1 and Rule 3:3 arguments.

The Court will therefore invite counsel for further brief and argue their pleas and motions as they relate to the remaining parties and issues, which are:

Count V - Tortious interference with contract
The Estate of Nicholas C. Miller

Count VII - Common Law Conspiracy
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas Miller

Count VIII - Sec. 18.2-499 Conspiracy
First Virginia Bank - Shenandoah Valley
Charles R. Cash
The Estate of Nicholas Miller

Accordingly, it is ADJUDGED & ORDERED that:

1) The Defendants Bradley K. Haynes and B. K. Haynes Corporation, be and are hereby dismissed with prejudice, from these proceedings;

2) Counsel for the remaining Defendants shall brief the remaining counts within twenty-one days of September 5, 1990, at which time plaintiffs' counsel shall respond within fourteen days thereafter; with reply reserved to defendants seven day thereafter;

3) Counsel may thereupon place the matter on the next available Motions Day for argument, or, in the alternative, counsel may inform the Court that they do not desire to argue further orally and the Court will render its decision upon the basis of the briefs submitted . .

AND this cause is continued.
Entered this 10 day of October, 1990

/s/ James L. Berry
James L. Berry JUDGE

We ask for this:

/s/ Kermit L. Racey
Kermit L. Racey
Counsel for Bradley K. Haynes and B. K. Haynes Corporation

/s/ George W. Johston, III
George W. Johnston III
Counsel for Bradley K. Haynes and B. K. Haynes Corporation

SEEN AND OBJECTED TO:

/s/ Kathleen T. Barlow, ESQ.
Kathleen T. Barlow
Counsel for First Virginia Bank - Shenandoah Valley and Charles R. Cash

SEEN AND OBJECTED TO:
/s/ William E. Shmidheiser III
Counsel for the Estate of Nicholas C. Miller

SEEN AND OBJECTED TO:
/s/ Ralph L. Payne
Ralph L. Payne
Counsel for Donald R. Lamborne and Jean Lamborne and Marjec, Inc.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 4th day of November, 1992.

Donald R. Lamborne, et al.,

Appellants,

against Record No. 921009
Circuit Court Nos. L89-118 and L89-119

Bradley K. Haynes, et al.,

Appellees.

From the Circuit Court of Frederick County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:
David B. Beach, Clerk
By: /s/
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of January, 1993.

Donald R. Lamborne, et al.,

Appellants,

against Record No. 921009
Circuit Court Nos. L89-118 and L89-119

Bradley K. Haynes, et al.,

Appellees.

Upon a Petition for Rehearing

On consideration of the petition of appellant Donald R. Lamborne to set aside the judgment rendered herein on the 4th day of November, 1992, and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Whiting did not participate in the consideration of this case.

A Copy,
Teste:

/s/
Clerk